controversies, thereby helping to ensure the rapid introduction of competitive local exchange and exchange access service offerings throughout the nation.

The need for Commission establishment of guidelines governing good faith negotiations is illustrated by TW Comm's experience in attempting to negotiate interconnection arrangements with Ameritech Ohio. In December 1994, TW Comm commenced negotiations with Ameritech Ohio with a declared need to have an interconnection arrangement negotiated and in place by the end of 1995 to meet TW Comm's planned in-service date. Ameritech personnel, which were changed and substituted throughout the process, lacked clarity, consistency, or focus in their negotiating positions. In addition, those personnel did not possess authority to commit Ameritech Ohio to any of the negotiated arrangements being discussed. At one point, Ameritech Ohio unilaterally terminated those negotiations indicating that, in Ameritech's view, it was not yet time for local telecommunications competition in Ohio, as other states carried greater potential as trial states for "interLATA relief."

Ameritech's willingness to negotiate in good faith with TW Comm on interconnection was tied to other Ameritech strategic goals totally unrelated to the interconnection issues. Those negotiations were further impeded by Ameritech demands that TW Comm execute one-sided nondisclosure agreements, and by Ameritech's baseless allegations of violations of those agreements. Yet another nondisclosure agreement currently is being demanded by Ameritech as a condition precedent to commencement of negotiations under the 1996 Act as though all that had preceded were irrelevant. In addition, Ameritech would provide rates without providing any cost support for those rates, and then would claim that such costs could not be disclosed to TW Comm despite the fact that nondisclosure agreements had been executed between Ameritech and TW Comm. Now that the Public Utilities Commission of Ohio ("PUCO") has begun to resolve the dispute to move forward with competition, Ameritech is challenging the process.

It has also become apparent that Ameritech is proposing to its state commissions that it can satisfy its Section 271 competitive presence and checklist requirements by filing generally available terms and conditions and qualifying under the "failure to request access" standard of Section 271(c)(1)(B) rather than the "presence of a facilities-based competitor" standard of Section 271(c)(1)(A), notwithstanding that new entrants, including TW Comm, already have requested interconnection and negotiation under Sections 251 and 252. Ameritech's intentional failure to meet the competitive checklist criteria is being evaded through an attempted "end run" around Section 271 to gain authority to provide long distance service.[18]

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[18] See letter from Paul J. Duffy, Legal Director, Public Utilities Commission of Ohio, to Ameritech, Certified NECs and NEC (continued...)

As indicated by Mr. Duffy's letter, while the 1996 Act requires the Commission to seek state input, the PUCO apparently is in the process of "determining its own role in the certification process under which Ameritech will obtain such relief." This further underscores the need for the Commission to act expeditiously to define and implement the appropriate rules and regulations required by the 1996 Act. The fact that Ameritech could seek such an avenue when viable facilities-based competition has been intentionally thwarted by its behavior is an outrageous example of bad faith negotiation.

While the Commission has long recognized that good faith negotiations do not ensure that an agreement will be reached,[19] the Commission also has recognized that "clarification of the term 'good faith' will facilitate negotiations and help reduce the number of disputes that may arise over varying interpretations of what constitutes good faith."[20] Accordingly, in certain

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[18](...continued)
Applicants, dated May 1, 1996, inviting comments on Ameritech's eligibility for InterLATA relief under Sections 271(c)(1)(A) or (c)(1)(B), attached hereto as Attachment 1.

[19]See e.g., WKBN B/casting Corp., *Memorandum Opinion and Order*, 30 FCC 2d 985 (1971).

[20]In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, Implementation of Sections 3(n) and 322 of the Communications Act, Regulatory Treatment of Mobile Services, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *First Report and Order, Eighth Report and*
(continued...)

circumstances, the Commission has defined "good faith" by articulating actions or behavior that would be considered evidence of good faith in the context of specific negotiations.

For example, in discussing the mandatory relocation negotiation period for incumbent point-to-point microwave operators currently using the 1850 to 1990 MHz band (which has been reallocated for use by broadband personal communications service licensees), the Commission concluded that good faith requires each party to the negotiations to provide information to the other party that is reasonably necessary to facilitate the relocation of the incumbent.[21] Although the Commission stated that the question of whether parties are negotiating in good faith should be evaluated on a case-by-case basis under basic principles of contract law, the Commission listed several specific factors that it would consider in evaluating claims that a party has not negotiated in good faith.[22] The Commission has identified behavior that is indicative

[20](...continued)
Order, And Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995) at ¶286.

[21]Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 95-157, FCC 96-196 (released April 30, 1996) at ¶21 ("Microwave Relocation Order").

[22]These factors include, *inter alia*: (1) whether the PCS licensee has made a bona fide offer to relocate the incumbent to comparable facilities; (2) if the microwave incumbent has demanded a premium, the type of premium requested, and whether the value of
(continued...)

of a party's failure to negotiate in good faith in the context of microwave relocation and it should do the same for purposes of implementing Section 251(c).

Examples of bad faith interconnection negotiating tactics that have been employed by ILECs in the past have included the following: (a) an initial non-response to an interconnection request; (b) linking an interconnection request with an unrelated negotiation between the parties; c) refusal to provide cost support data for proposed charges; (d) presenting a draft interconnection agreement without critical terms; (e) demanding that non-price terms be negotiated before proposing price terms; (f) demanding that certain order forms be completed even though much of the requested information is unnecessary to process an interconnection request and is confidential in nature; (g) offering interim interconnection arrangements that it knows are unacceptable; (h) proposing network usage and other rates that it knows are unacceptable without any support material; (i) delays in providing and/or refusal to provide cost support materials; j) sending the new entrant to an unregulated affiliate of the ILEC to obtain critical services obtained by the ILEC on favorable terms; and k)

[22](...continued)
the premium as compared to the cost of providing comparable facilities is disproportionate; (3) what steps the parties have taken to determine the actual cost of relocation to comparable facilities; and (4) whether either party has withheld information requested by the other party that is necessary to estimate relocation costs or to facilitate the relocation process. Id.

misuse of nondisclosure agreements by requiring nondisclosure of the entirety of negotiation proceedings, not only specified confidential, competitively-sensitive information. The effect of these restrictions is to preclude a negotiating party from discussing the content of negotiation sessions during subsequent arbitration proceedings, including those conducted by state commissions. Moreover, the requirement for multiple nondisclosure agreements can be used by ILECs to divert resources from the substantive interconnection issues which are to be negotiated. National "good faith" negotiation guidelines for purposes of Section 251(c) should, at a minimum, prohibit these types of conduct by negotiating parties.

In addition to articulating national standards governing good faith negotiations, the Commission must require penalties to be imposed upon parties that fail to negotiate in good faith. In the context of its microwave relocation rules, the Commission noted that "penalties for failure to negotiate in good faith should be imposed on a case-by-case basis. We emphasize, however, that we intend to use the full realm of enforcement mechanisms available to us in order to ensure that licensees bargain in good faith."[23] The Commission should take an equally strong position here by sending an unmistakable signal that appropriate penalties will be taken against ILECs that fail to negotiate in good faith as required by

[23]Microwave Relocation Order, *supra* at ¶22.

Section 251(c)(1).

Finally, the 1996 Act provides the Commission with the authority to impose standards defining "good faith" negotiation for purposes of Section 251(c). Section 251(d)(1) of the 1996 Act directs the Commission to establish regulations necessary to implement the requirements of Section 251. Because national standards providing guidance on what constitutes "good faith" negotiation will facilitate agreements between ILECs and requesting telecommunications carriers, such national standards are wholly consistent with the Commission's statutory directive.[24]

b. The Commission Should Adopt A "Fresh Look" Policy With Respect To Agreements Entered Into Prior To February 8, 1996

The Notice seeks comment on the effect of Section 252 on interconnection agreements that predate the 1996 Act.[25] First, the Notice asks whether Section 252 requires parties that have existing agreements to submit those agreements to state commissions for approval. The statutory language clearly indicates the parties are required to do so. In referring to agreements arrived at through

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[24]In addition, the Commission has previously held that it has plenary jurisdiction, under Section 2(a) of the Communications Act, to require that interconnection negotiations be conducted in good faith. See Cellular Interconnection Reconsideration Order, *supra* at ¶¶10-19. Pursuant to this authority, the Commission has issued various statements on what would and would not constitute good faith with respect to cellular/LEC interconnection negotiations. See id.

[25]Notice at ¶48.

voluntary negotiations, Section 252(a) provides that "[t]he agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission...." (emphasis added.) There is no room for state or Commission discretion in interpreting this provision. Review and approval of preexisting agreements will enable state commissions to identify any provisions that are inconsistent with the requirements of Section 252(e). Should a state commission make such a finding, the parties should have the right, upon request, to renegotiate the offending provision(s) of the agreement subject to the obligations and duties set forth in Section 251.

The Notice also seeks comment on whether one party to an existing agreement may compel renegotiation (and arbitration) in accordance with the provisions of the 1996 Act.[26] In addition to cases where a state commission finds any of the terms or conditions of a preexisting agreement contrary to the 1996 Act, TW Comm submits that the Commission should adopt a rule establishing a "fresh look" period during which either a requesting telecommunications carrier or an ILEC may ask the other party to renegotiate all or portions of those agreements which predate the 1996 Act. To the extent that preexisting agreements are not as favorable to competitive entities than an agreement which would now

[26]Notice at ¶48.

be available, a "fresh look" period would be in keeping with the spirit and intent of the 1996 Act to rapidly develop local exchange and exchange access competition. Absent a "fresh look" alternative, the competitive provider would be forced to wait until the expiration of the existing agreement before being able to take advantage of the 1996 Act's pro-competitive mandates.

The Commission has previously implemented "fresh look" procedures in order to foster competition when changed circumstances warranted such action. For example, in adopting expanded interconnection obligations, the Commission noted that the existence of certain long-term access arrangements raised anticompetitive concerns since they tend to "lock up" the access market, thereby preventing customers from obtaining the benefits of the new, more competitive interstate access environment.[27] To address this situation, the Commission required that LEC customers with long-term access arrangements should be permitted to take a "fresh look" to determine if they wished to avail themselves of a competitive alternative.[28]

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[27]Expanded Interconnection with Local Telephone Company Facilities, *Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd 7369 (1992) at ¶201. The Commission also adopted a "fresh look" policy in the context of 800 number portability. See In the Matter of Competition in the Interstate Interexchange Marketplace, *Report and Order*, CC Docket No. 90-132, 6 FCC Rcd 5880 (1991) at ¶151.

[28]In the context of expanded interconnection, the Commission limited the right to take a "fresh look" to customers with LEC (continued...)

The fundamental changes set forth in the 1996 Act with respect to the relationship between ILECs and requesting telecommunications carriers demonstrates "changed circumstances" in a dramatic fashion. And now that Congress has clearly articulated a national policy of local competition and set forth very specific obligations on the ILECs, all competitors should be afforded the immediate opportunity to take advantage of this new competitive environment. In short, as was the case with expanded interconnection, the adoption of a "fresh look" policy in connection with the obligations of ILECs pursuant to Section 251(c) would foster competition. As such, TW Comm suggests that the Commission permit either the requesting telecommunications carrier or an ILEC with an interconnection agreement for a term longer than one year entered into on or before February 8, 1996, to renegotiate this agreement pursuant to the provisions of Sections 251 and 252 of the Act.[29]

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[28](...continued)
arrangements for terms in excess of three years entered into on or before September 17, 1992 (the date on which the Commission adopted its expanded interconnection order). In addition, the Commission limited the right to end a long-term arrangement to a specific time period. Expanded Interconnection with Local Telephone Company Facilities, *Second Memorandum Opinion and Order on Reconsideration*, CC Docket No. 91-141, 8 FCC Rcd 7341 (1993) at ¶9.

[29]Whereas the negotiation/arbitration process could take a significant amount of time to reach closure, TW Comm suggests that, as part of a "fresh look" policy, the Commission require that existing agreements remain in effect so that service to the public is not disrupted.

2. Interconnection, Collocation, And Unbundled Elements

a. Interconnection

As stated in the introduction to these comments, TW Comm believes that the goal of national telecommunications competition in all markets, including local markets, requires the promulgation of nationally uniform regulations. Thus, TW Comm concurs with the tentative conclusion stated at ¶50 of the Notice that there should be uniform national rules for evaluating interconnection arrangements. Such rules would reduce the potential for ILECs to delay entry, and would facilitate multistate entry by new entrants.

As used in Section 251(c)(2), "interconnection" refers only to the facilities and equipment used to link two networks, and does not include the transport and termination of traffic. Had Congress intended to include "transport and termination" within "interconnection," it would not have provided for them in separate sections of the statute, nor would it have established separate pricing standards. Any interpretation which lumps into one category two separate and discrete obligations deviates from the plain language of the statute. Moreover, TW Comm does not believe that there is any public interest goal which would warrant such a strained interpretation of the plain language of the 1996 Act.

b. Technically Feasible Points Of Interconnection

Section 252(c)(2)(B) requires ILECs to permit interconnection "at any technically feasible point" within its network. TW Comm does not believe that any purpose would be served by the Commission attempting to prescribe a comprehensive list of technically feasible interconnection points. Technology is evolving as is network architecture. Interconnection points which may not be technically feasible today may become so tomorrow, and the Commission should avoid rules which effectively "lock in" points of interconnection to those which are technically feasible at a specific point in time.

TW Comm concurs with the Commission's tentative conclusion that any point in the ILEC network should be presumptively a technically feasible point and that those claiming a point not to be feasible based on alleged harm to the network (network reliability grounds) should bear the burden of demonstrating the risk of such harm.[30] This approach is consistent with the Commission's longstanding policy regarding interconnection of private equipment with the public network, *i.e.*, that consumers may utilize such equipment in any manner that is privately beneficial without being publicly detrimental.[31] Relatedly, TW Comm agrees that any network point of interconnection should be presumptively technically feasible when a LEC has allowed interconnection at that

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[30] Notice at ¶56.

[31] See Hush-a-Phone Corporation v. FCC, 238 F.2d 266 (1956), Carterfone, 13 FCC2d 420, *aff'd. on recon.* 14 FCC2d 571 (1968).

point.[32]

3. Just, Reasonable And Nondiscriminatory Interconnection And Interconnection That Is Equal In Quality To That Provided By An ILEC To Itself Or An Affiliate

The Commission invites comment on whether it should adopt uniform national guidelines governing installation, maintenance, and repair of ILECs' interconnection facilities, as well as performance standards, and whether it should adopt guidelines governing non-recurring costs of installation.[33] The Commission also asks for comment on the Section 252(c)(2)(C) requirement that interconnection be at least equal in quality to that provided to the ILEC by itself or to an affiliate.[34]

An important aspect of these statutory requirements involves provisioning of interconnection facilities, primarily provisioning intervals. At the very least, ILECs must be required on a national basis to adhere to the same provisioning standards for other telecommunications carriers that they meet for themselves. However, the pro-competitive goals of the 1996 Act necessitate that ILECs must be subject to rigorous provisioning standards even if those standards are more aggressive than those which ILECs impose

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[32]Notice at ¶57.

[33]*Id.* at ¶61.

[34]*Id.* at ¶63.

upon themselves. As noted in the introduction to these comments, ILECs have incentives to attempt to perpetuate their monopolies and to forestall significant competition by delaying delivery of facilities and essential services to prospective competitors.[35] ILEC practices and intervals which result in preservation of their market shares either by making consumer selection of a competing provider difficult or by delaying the ability of consumers to obtain service from competing providers undermine the goal of competitive local markets. Therefore, the Commission's rules should specify that, for interconnection to be considered, just, reasonable, and nondiscriminatory as required by the Act, performance standards should be specified in interconnection agreements. Those agreements also should be required to include performance penalties for failure to adhere to those performance standards. A clear definition of the conditions which constitute nonperformance should be included so that applicable penalties will be self-executing, rather than being subject to enforcement only through a complaint process.

[35] TW Comm has had first-hand experience where interconnection provisioning has been given low priority. ILECs frequently have delayed due dates which are given with no guarantees and no penalties for failure to meet those due dates. Of course, these provisioning delays by ILECs prevent competing providers like TW Comm from being able to initiate service to new customers in a timely manner. An effect of these delays is to create the misimpression in the minds of those potential new consumers that the resulting service delay is TW Comm's fault.

4. Collocation

a. National Rules And Standards Are Needed For Collocation Arrangements

TW Comm concurs with the Commission's tentative conclusion that it should "adopt national standards where appropriate to implement the collocation requirements of the 1996 Act."[36] Those requirements are contained in Section 251(c)(6) which states that each ILEC has the duty

> to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitation.

TW Comm agrees with the Commission that the adoption of national uniform standards would speed the negotiation process, facilitate entry by competitors in multiple states and could add speed, fairness and simplicity to the arbitration process and reduce uncertainty.[37] As the Commission recognizes, local exchange competition is taking on a regional and even national character.

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[36]Notice at ¶67. Congress has provided the Commission with the authority to promulgate national rules and standards. Section 251(d)(1) instructs the Commission to establish regulations to implement the requirements of Section 251 and Section 252(c)(1) requires State commissions to ensure that any arbitrated resolution of any open issues in an interconnection negotiation meets the regulations prescribed by the Commission pursuant to Section 251.

[37]Notice at ¶ 67.

The companies that seek to compete in a local exchange market generally seek to do so in multiple states. The growing number of these companies includes AT&T, MCI, Sprint, MFS, and TCG, among others.

By failing to adopt national guidelines, the Commission would encourage the creation of a patchwork quilt of differing interpretations of the collocation provisions of the 1996 Act. The resulting variations in technical and procedural requirements would create a formidable obstacle to -- indeed, in some cases stifle -- the introduction and development of local exchange competition. In addition, national standards are critical for interconnection arrangements because the same facilities are used to interconnect both intrastate and interstate services. Having one set of standards for collocation on the interstate level and a different set on the intrastate level is simply not defensible.

The Commission points to the use of the term "premises" in Section 251(c)(6) as an example of the need for national standards.[38] The Commission states that Section 251(c)(6) mandates physical collocation at the "premises" of an ILEC and it tentatively concludes that "premises" includes, in addition to ILEC central offices or tandem offices, all buildings or similar structures owned or leased by the ILEC that house LEC network

[38] Notice at ¶71.

facilities.[39] It is not clear whether the Commission intends that it be within the interconnector's discretion to determine where on the ILEC's premises it may physically collocate its equipment. TW Comm is concerned that an ILEC might be permitted to satisfy its Section 251(c)(6) collocation obligation by unilaterally selecting the location on its premises where it will permit other telecommunications carriers to collocate their equipment, irrespective of the suitability of that location for the interconnectors' use.

The key phrase in Section 251(c)(6) for purposes of this discussion is "physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." TW Comm submits that the term "premises" refers to the location where the interconnection or access to unbundled network elements must take place. Congress evinced no intent to change the Commission's definition of physical collocation:

> [Collocation is] an offering that enables an interconnector to locate its own transmission equipment <u>in a segregated portion of a LEC central office</u>. The interconnector pays a tariffed charge to the LEC for the use of that central office space, and may enter the central office to install, maintain and repair the collocated equipment.[40]

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[39] *Id.*

[40] 47 C.F.R. §64.1401(d) (emphasis added); <u>Expanded Interconnection with Local Telephone Company Facilities</u>, CC Docket (continued...)

Thus, absent the technical feasibility and space availability limitations of Section 251(c)(6), the physical collocation of interconnector-owned equipment must occur at the ILEC central office. This view is supported by the legislative history of Section 251(c)(6):

> The experience at the Commission, with its proceeding on expanded interconnection, (Expanded Interconnection Mandated for Interstate Special Access (CC Docket 91-141) (Sept. 17, 1992)), and the experience in some of the States on implementing interconnection, leads the Committee to conclude that the risk of discriminatory interconnection grows the farther one gets away from the central office of the carrier. It is for this reason that the legislation mandates actual, or physical, collocation with the exception as noted above.[41]

The Commission's interpretation of the term "premises" should not be read to dilute the mandatory character of the physical collocation requirement by allowing an ILEC to offer such collocation at some other location on its "premises" and thereby avoid having to allow equipment placed in its central office.

On the other hand, the Commission should make clarify that if technical feasibility or space limitations excuse physical collocation in the central office, the ILEC continues to have a

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[40](...continued)
No. 91-141, *Notice of Proposed Rulemaking and Notice of Inquiry*, 6 FCC Rcd 3259 (1991) at ¶19; *Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd 7369 (1992) at ¶39, recon., 8 FCC Rcd 127 (1993), *vacated in part and remanded sub nom.* Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994); *Memorandum Opinion and Order*, 9 FCC Rcd 5154 (1994) at ¶7.

[41]H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 73 (1995).

duty to afford physical collocation elsewhere on its premises. The term "premises" draws its definition from the context in which it is being used.[42] For purposes of determining what constitutes the premises of an ILEC in a case where physical collocation at a central office has been excused, TW Comm suggests that the term "premises" should be given a broad definition. In this manner, the Commission would best effectuate Congressional recognition of the importance of physical collocation by requiring the ILEC to afford the interconnector the ability to physically locate its equipment anywhere the ILEC's network facilities are located.

b. The Section 251(c)(6) Duty Of Incumbent Local Exchange Carriers To Provide Physical Collocation Does Not Preclude Other Methods Of Interconnection

It is not a Congressional mandate that physical collocation be the exclusive method of interconnection. Rather, Congress has

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[42]See C.F. Communications Corporation v. Century Telephone of Wisconsin, Inc., et al., 10 FCC Rcd 9775 (1995) at n.49 and n.51 (rejecting dictionary definitions of the word "premises" and stating that courts and other authorities have noted "that the word 'premises' does not have a single fixed meaning but is, rather, defined according to its context."), citing Gibbons v. Brandt, 170 F.2d 385, 387 (7th Cir. 1948) ("the word 'premises' does not have one fixed and definite meaning. It is to be determined always by its context...."); O'Connor v. Great Lakes Pipe Line Co., 63 F.2d 523, 525-26 (8th Cir. 1933) ("There can be no definition of the word 'premises' applicable to every situation in which it may be used. It is a word of many meanings and usages."); Black's Law Dictionary 1180-1181 (6th ed. 1990) ("Premises is an elastic and inclusive term, and it does not have one definite and fixed meaning; its meaning is to be determined by its context and is dependent on circumstances in which used....").

mandated that the ILEC offer physical collocation to other telecommunications carriers. Thus, Section 251(c)(6) does not preclude other forms of interconnection if mutually agreeable to the ILEC and the interconnector. Indeed, physical collocation is only one of three main interconnection methods which facilitate competition, and the Commission should require ILECs to make all three available at the option of a new entrant. The other two methods are virtual collocation and meet point arrangements.

Indeed, Section 252(a)(1) provides for a period of up to 135 days within which an ILEC "may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251."[43] Clearly, Congress contemplated the parties being able to negotiate and enter into interconnection agreements that do not necessarily incorporate the Section 251(c)(6) duty of an ILEC to provide physical collocation.

The Commission has already shown itself to be open to alternative interconnection arrangements, albeit in the context of its 1994 decision mandating virtual collocation.[44] There is no reason why the Commission should not restate these same views now for alternatives to physical collocation that are mutually agreed

[43] 47 U.S.C. §252(a)(1).

[44] Expanded Interconnection with Local Telephone Company Facilities, *supra*, 9 FCC Rcd at 5167.

upon by ILECs and other telecommunications carriers. Finally, Commission flexibility in this area is consistent with the primordial pro-competitive objective of the 1996 Act -- to establish "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry. Viewed in this light, the "physical collocation" requirement embodied in Section 251(c)(6) cannot be read to preclude other types of interconnection arrangements that are mutually agreed to by other telecommunications carriers and ILECs. The purpose of the requirement is to promote competition. Any interconnection arrangement that has been mutually agreed upon between an ILEC and another telecommunications carrier which will bring additional competition into the marketplace should be encouraged. Prospective interconnectors should be free to select an interconnection arrangement other than physical interconnection and/or to negotiate away the ILEC's duty to provide physical collocation.

c. The Commission Should Promptly Reaffirm Its Earlier Mandatory Physical Collocation Rules And Policies

In the long and tortuous history of CC Docket No. 91-141, the Commission developed an extensive record leading to the adoption of rules governing the rates, terms, and conditions of physical collocation. The Commission's adoption of mandatory physical collocation was subsequently overturned by the United States Court of Appeals for the District of Columbia Circuit on the basis that Section 201 of the Act did not empower the Commission "to grant third parties a license to exclusive physical occupation of a section of the LEC's central offices."[45] Thus, the Commission's rules implementing mandatory physical collocation became ineffective not because of any procedural or substantive problem with the rules themselves but, rather, because the Commission was deemed to lack the authority to promulgate them. Congress has now cured this defect. TW Comm submits that the Commission should immediately reaffirm its original rules governing mandatory physical collocation as part of its national standards.[46]

Because the statutory requirement is not limited to any particular kind of equipment or end user service, the Commission's regulations should emphasize that it encompasses any existing or future form of transmission equipment deployed in central offices. The Commission should be careful not to take a static view of technology. The Commission should make clear that as technological changes produce transmission equipment that would make the

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[45]Bell Atlantic Telephone Companies v. FCC, *supra*, 24 F.3d at 1446.

[46]Expanded Interconnection With Local Telephone Company Facilities, *supra*, 7 FCC Rcd 7369, 8 FCC Rcd 127. In responding to the Bell Atlantic decision, the Commission reaffirmed, for purposes of a new permissive physical collocation policy, the applicability and effectiveness standards it had adopted as part of its mandatory physical collocation requirement. Expanded Interconnection with Local Telephone Company Facilities, *supra*, 9 FCC Rcd 5154 at ¶40.

interconnection arrangement more efficient, its collocation policies encompass the placement of such equipment in the LEC central offices.

Physical collocation should be made available through the use of existing ILEC facilities, with the sole exception being where no such facilities exist. In such a case the ILEC should be required to provide reasonable substitute arrangements (including, but not limited to, virtual collocation or meet point arrangements) at the cost it affords such facilities to itself. Charges for the rent of the floor space occupied by the collocating carrier's equipment should be limited to the average local rent for similar space in similar conditions in similar geographic locations.[47] All other charges imposed on the collocating carrier by the carrier in whose facility the collocation occurs should be limited to the Total Service Long Run Incremental Cost (TSLRIC) of accommodating the equipment and space of the collocating carrier.[48]

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[47] Any special security arrangements, including cages and alarms should only be installed at the request of the interconnector, and any charges for such construction should be limited to the costs that would have been borne by the interconnector had it performed the construction itself.

[48]The cost standard of the statute is not satisfied by offering rental of real estate plus two channel terminations at tariffed rates. First, tariff rates currently reflect a fully allocated cost standard which is inconsistent with the "interconnection at cost" standard of Section 251. Second, channel termination rates reflect the fact that most customers are far from a central office, and thus impose much greater costs than are involved in the provisioning of connections to collocated equipment. Costing (continued...)

d. The Commission Should Promptly Reaffirm A Modified Version Of Its Earlier Virtual Collocation Rules And Policies

The D.C. Circuit recently remanded the Commission's decision adopting a mandatory virtual collocation policy because the 1996 Act now establishes a mandatory physical collocation policy.[49] The Commission should now also generally reaffirm the rules originally adopted for mandatory virtual collocation in CC Docket No. 91-141 to govern the alternative use of virtual collocation.[50] Pursuant to Section 251(c)(6) of the Act, virtual collocation arrangements are the default interconnection method if "the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitation." Since the state commissions will initially determine whether the duty of an ILEC to provide physical collocation is to be excused, it is therefore extremely important that the Commission re-establish the regulatory framework to govern the provision of virtual collocation by ILECs. Moreover, such a

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[48](...continued)
considerations, including the TSLRIC standard, are discussed in these comments at II.C.6 (a)-(d).

[49]Pacific Bell v. FCC, __ F.3d ____ (D.C. Cir. 1996) (filed March 22, 1996) (1996 U.S. App. LEXIS 10801).

[50]See, e.g., Expanded Interconnection with Local Telephone Company Facilities, *supra*, 9 FCC Rcd at 5169-5174. In responding to the Bell Atlantic decision, the Commission reaffirmed, for purposes of its mandatory virtual collocation policy, the applicability and effectiveness of the standards it had adopted as part of its permissive virtual collocation requirement. *Id.* at ¶40 and ¶44.

regulatory framework will expedite the negotiation of virtual collocation arrangements where both the LEC and the interconnector voluntarily choose such arrangements instead of physical collocation, as well as govern ongoing terms and conditions for existing virtual collocation arrangements.

The Commission's earlier virtual collocation rules should be modified to include the so-called "$1 sale and repurchase option" arrangement. This arrangement involves the acquisition by the interconnectors of the equipment to be dedicated for interconnectors' use on the LECs' premises and the sale of that equipment to the LECs for a nominal $1 sum while maintaining a repurchase option.[51] In the aftermath of the requirement in the Bell Atlantic decision, the LECs argued that such an arrangement would be outside the Commission's authority because it would deprive the LECs of ownership and control of the equipment and therefore amount to mandatory physical collocation. Any question concerning the Commission's authority in this area has been mooted by the enactment of Section 251(c)(6). The Commission clearly has the authority to mandate a $1 sale and repurchase option for equipment to be owned by the ILEC and located on its premises and

[51]A variation of this arrangement involves the so-called "$1 leaseback" option which is fairly prevalent in current virtual collocation arrangements. In this arrangement, the interconnector buys the equipment, leases it to the LEC who leases it back to the interconnector for $1. This arrangement can be converted to physical interconnection by allowing interconnectors to "buy-back" the equipment for $1.